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MONTANA EIGHTEENTH JUDICIAL DISTRICT, GALLATIN COUNTY

UPPER MISSOURI WATERKEEPER Plaintiff, v. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, an agency of the State of Montana Defendant.	Case No. **COMPLAINT**

COMES NOW Plaintiff, Upper Missouri Waterkeeper (Waterkeeper), through counsel, and in support of their complaint seeking review of the November 30th, 2016 decision of the Montana Department of Environmental Quality (DEQ) issuing a statewide General Permit for small Municipal Separate Storm Sewer Systems, declaratory relief, and its other claims and causes of action, states and alleges as follows:

Introduction

This case involves the failure of Defendant Montana DEQ to take the necessary steps to clean up one of the biggest sources of water pollution in Gallatin County and

other areas of Montana experiencing intense land development: urban and suburban runoff, often referred to as "stormwater" pollution. DEQ consistently identifies stormwater pollution as a prominent cause of water quality impairment in rivers, streams, and other waters adjacent to and receiving flows from developed landscapes. DEQ has identified dozens of waters that, due in whole or in part to stormwater pollution, do not meet water quality standards established to protect fishing, swimming, and other recreational and ecological uses.

Montana's – not to mention Gallatin County's - important outdoors-based economy is predicated in large part on clean, healthy waterways. When a Montana stream or river becomes too polluted to support its designated uses, the effect reverberates into the local and even state economy, both in terms of foregone economic activity related to tourism and recreation, but also in terms of cost to government and tax-payers, which now must shoulder the heavy burden of cleaning up those waterways.

DEQ is responsible for regulating stormwater pollution to protect the state's waterways, pursuant to specific requirements established by state and federal law. The agency does so primarily by issuing, and periodically renewing and revising, a Montana Pollution Discharge Elimination System (MPDES) General Permit, which sets forth requirements applicable to municipal separate storm sewer systems (MS4s) (hereinafter the "General Permit").

DEQ issued the latest version of the General Permit on November 30, 2016. Notwithstanding DEQ's acknowledgement of the need to strengthen its stormwater controls and proactively address municipal stormwater pollution, the General Permit unlawfully authorizes MS4s to avoid utilizing all available measures to control such

pollution "to the maximum extent practicable," and to continue discharging such pollution at levels that violate state water quality standards. The General Permit also fails to require sufficient monitoring adequate to assess either compliance under the Permit or, for certain permitees, track progress towards meeting water quality standards. Last, the General Permit does not provide a mechanism by which the public can substantively comment on the adequacy of certain effluent limitations.

Jurisdiction and Venue

1. This Court has jurisdiction over Plaintiff's claims pursuant to the Uniform Declaratory Judgments Act, Mont. Code Ann. §§ 27-8-201, 202; the Montana Water Quality Act § 75-5-101 MCA *et seq.*; *inter alia* Article II, Section 3 and Article IX, Section 1 of the Montana Constitution; and as an administrative agency action.
2. Venue is proper in this district under §§ 25-2-126 and 2-4-506(4) MCA because Plaintiff is located and has its principal place of business in this judicial district.

Parties

3. Plaintiff Upper Missouri Waterkeeper (Waterkeeper) is a non-profit, public-benefit corporation pursuant to 35-2-101 MCA *et seq.* Waterkeeper is dedicated exclusively to protecting and improving the ecological and aesthetic value of Southwest and West-Central Montana's Upper Missouri River Basin for present and future generations. Waterkeeper has a history of using public participation opportunities to inform the public about pollution issues in the Upper Missouri River Basin. Waterkeeper and its members have as their mission the goal of protecting water quality and ensuring compliance with laws and regulations of Montana and the United States. To accomplish this goal, Waterkeeper utilizes a combination of strong

science, community action, and legal expertise to defend the Missouri River, its tributaries, and communities against threats to clean water and healthy rivers. Waterkeeper participated in a 2-year stakeholder workgroup culminating in DEQ's final General Permit, as well as submitted extensive technical comments and provided oral testimony concerning the General Permit.

4. DEQ's issuance of the General Permit threatens to adversely affect Waterkeeper's organizational interests in protecting watershed integrity, water quality, fishery health, recreational opportunities, as lawful governance and adherence to proper legal procedure.

5. DEQ's issuance of the General Permit also adversely affects Waterkeeper's members and their shared interest in strong water quality protections based on law, healthy fisheries, clean water, excellent recreational opportunities and lawful governance.

6. Waterkeeper's members include individuals who aesthetically enjoy, fish, and recreate in and around waters affected by municipal stormwater pollution.

7. DEQ's General Permit contains unlawfully weak pollution limits, sanctions continued pollution discharges, and undermines critical water protection safeguards, and in so doing threatens the health, livelihood, and recreational enjoyment of Waterkeeper's members.

8. Waterkeeper's aesthetic, conservation, economic, and recreational interests have been, are being, and—unless their requested relief is granted—will continue to be adversely and irreparably injured by DEQ's failure to comply with governing law. These are actual, concrete injuries, traceable to Defendant's conduct that would be redressed by the requested relief.

9. Defendant DEQ was established by the legislature in Chapter 418, Laws of 1995 (SB 234). DEQ is responsible under Montana law for protecting water quality and issuing permits. Mont. Env'l Info. Ctr. v. Dep't of Env'l Quality, 1999 MT at ¶ 5, 296 Mont. at 210-11, 988 P.2d 1236, 1237. DEQ's "mission is to protect, sustain, and improve a clean and healthful environment to benefit present and future generations." DEQ, *Mission Statement and Guiding Principles*.

LEGAL BACKGROUND

The Federal Clean Water Act & NPDES Program, 33 U.S.C. §§ 1251, *et seq.*

10. The Federal Water Pollution Control Act, more commonly called the Clean Water Act (CWA), 33 U.S.C. § 1251, *et seq.*, creates, *inter alia*, the national pollutant discharge elimination system (NPDES), a mandatory permitting program for point-source discharges of water pollution to surface waters. *See* 33 U.S.C. § 1342. The NPDES program is

> a means of achieving and enforcing…effluent limitations. Under the NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms. An NPDES permit serves to transform generally applicable effluent limitations and other standards – including those based on water quality – into the obligations (including a timetable for compliance) of the individual discharger…

U.S. Env'tl Prot. Agency v. California State Water Res. Control Bd., 426 U.S. 200, 205 (1976) (internal footnotes omitted).

11. NPDES permits control water pollution through two overlapping approaches. First, the permits set effluent limitations (*i.e.,* controls on the discharge of pollutants) based on specified standards of pollution control technology. 33 U.S.C. §§ 1311(b), 1342(a). Second, where these technology-based standards are not sufficient to ensure compliance with applicable water quality standards, the CWA requires NPDES

permits to impose more stringent "water quality based effluent limitations." 33 U.S.C. §§ 1312(a), 1342(a).

12. The CWA and its implementing regulations include procedural and substantive requirements that apply specifically to NPDES permits for MS4s. *See* 33 U.S.C. 1342(p)(3); 40 C.F.R. §§ 122.34, 122.44(a), 122.44(d), 123.35. A core requirement is that all MS4 permits

> shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

33 U.S.C. § 1342(p)(3)(B)(iii) (emphasis added); *see also* 40 C.F.R. § 122.34(a).

13. Stormwater was explicitly regulated under the NPDES program through 1987 amendments to the CWA. Among other things, these amendments directed EPA to establish regulations and require permits for stormwater discharges from MS4s serving cities with a population over 100,000 people. 40 C.F.R. § 122.26(a)(3). The 1987 amendments also directed EPA to analyze, report on, and designate additional sources of stormwater pollution and establish "a comprehensive program to regulate" these stormwater discharges "to protect water quality." 33 U.S.C. § 1342(p)(6). In 1999, EPA adopted regulations providing, among other things, that NPDES permits are required for discharges from MS4s serving communities with a population between 10,000 to 100,000 people, referred to as "small MS4s." 40 C.F.R. §§ 122.26(a)(9)(i)(A).

14. NPDES permits for small MS4s must require the permittees to develop and implement a Storm Water Management Program ("SWMP") that, among other things,

reduces "to the maximum extent practicable" the discharge of pollutants from post-construction stormwater runoff (*i.e.,* runoff from impervious surfaces that are altered or created by new development or redevelopment projects). 40 C.F.R. § 122.34(b)(5).

15. Enforceable runoff management plans developed pursuant to the requirements of a NPDES permit, such as SWMPs for small MS4s, constitute "effluent limitations" under the CWA. Therefore, the agency issuing an MS4 permit is responsible for ensuring that permittees' SWMPs comply with the requirements of the CWA, and the public has a right to play a meaningful role in the agency's review of such SWMPs, including the right to submit comments on the adequacy of a SWMP. *See* Envtl. Def. Ctr., Inc. v. USEPA, 344 F.3d 832, 855-56 (9th Cir. 2003) (EDC); Waterkeeper Alliance v. EPA, 399 F.3d 486, 503 (2d Cir. 2005) (Waterkeeper); 33 U.S.C. § 1251(e), 33 U.S.C. § 1342(a)(1) & (j).

16. The CWA requires states to establish water quality standards for waters within their boundaries. Water quality standards comprise the designated uses of the water body, *e.g.*, primary contact recreation or propagation of fish, and the water quality criteria or standards that must be met to maintain the designated use. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.3(i).

17. The CWA also requires states to regularly publish a list of waters that fail to comply with state water quality standards because of excessive levels of pollution. *See* 33 U.S.C. § 1313(d). For waters included on this list (known as the "303d List" after the section of the CWA that directs its production), states typically must develop Total Maximum Daily Loads (TMDLs), which establish a cap on the level of pollutants the

impaired waterbody can tolerate on a daily basis and still meet its designated water quality standard. TMDLs must allocate this maximum pollutant load across all sources of pollution to the water body. *See* 40 C.F.R. § 130.7(c). TMDLs thus serve as a "pollution budget" for the impaired water body.

18. The pollution allocations in TMDLs are broken into two categories: "Waste Load Allocations," or "WLAs," that apply to "point source" discharges, including those flowing from MS4 outfalls; and "Load Allocations," or "LAs," that apply to more diffuse sources of pollution, such as runoff from farm fields. A "Waste Load Allocation" is "[t]he portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution." 40 C.F.R. 130.2(h) (emphasis added). NPDES permits must contain "water quality based effluent limitations" calculated to reflect TMDL Waste Load Allocations. 40 C.F.R. § 130.12(a).

19. In order "to assure compliance with permit limitations," NPDES permits must include requirements to monitor the mass or concentration of pollutants discharged, the volume of any discharges, or other appropriate measurements. 40 C.F.R. § 122.44(i)(1).

Montana's MPDES Program, 75-5-401 MCA *et seq.*, & ARM 17.30.1301 *et seq.*

20. Federal law allows states to assume NPDES permitting responsibilities, provided that the state permitting program ensures compliance with the procedural and substantive requirements of the CWA, including the stormwater permitting requirements described above. 33 U.S.C. § 1342(b)(1); 40 C.F.R. §§ 123.25(a).

21. Montana has assumed NPDES permitting responsibilities through its MPDES program. *See* ARM 17.30.1301, 1303. Under state law, MPDES permitting is administered by DEQ, through a program that must be "compatible with the [NPDES] program as established by the [EPA] pursuant to section 402 of the federal Clean Water Act." *Id.*; *see also* ARM 17.30.1101(1) (providing for specific consistency between Montana stormwater permits and federal NPDES requirements); 17.30.1301 (requiring consistency generally between MPDES and NPDES permit requirements); 17.30.1311(1) (prohibiting all discharges not permitted by, *inter alia*, the CWA).

22. Pursuant to DEQ regulations, no MPDES permit may be issued when the conditions of the permit do not provide for compliance with applicable requirements of the Montana Water Quality Act (MWQA), which implements requirements of the federal NPDES program applicable to the States. *Id.*; *see also* ARM 17.30.1102(11).

23. Montana law specifically incorporates the federal requirements applicable to stormwater discharge permits. ARM 17.30.1101(1); ARM 17.30.1111(5) (MPDES permits for MS4 discharges must satisfy "water quality requirements of the federal Clean Water Act.")

24. The Board of Environmental Review (BER) and DEQ have established water quality standards for waters across Montana. All MPDES discharge permits must achieve limitations "necessary to meet water quality standards," as required by CWA section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).

25. Applicable EPA regulations prohibit the issuance of a MPDES permit "when the imposition of conditions cannot ensure compliance with the applicable water quality

requirements." 40 C.F.R. § 122.4(d). Accordingly, all point source permits must contain limitations "necessary to…[a]chieve water quality standards established under section 303 of the CWA, including state narrative criteria for water quality." 40 C.F.R. § 122.44(d)(1). Furthermore, CWA implementing regulations require as a mandatory condition for state NPDES permit that, "when…a discharge causes, has a reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standards for an individual pollutant, the permit must contain effluent limits for that pollutant." 40 C.F.R. § 122.44(d)(1)(ii). Montana state law incorporates these requirements explicitly through ARM 17.30.1344(1) ("[E]ach MPDES permit must include conditions meeting the requirements stated in 40 C.F.R. 122.43, 122.44, 124.56, an 124.57").

26. MPDES permits must also contain recording, reporting, monitoring, and sampling requirements applicable under the CWA and be "representative of the monitored activity." 40 C.F.R. 122.48(b); *see also* ARM 17.30.1342(10)(a), 17.30.1343(1)-(2).

27. State law requires public notice of, and an opportunity to comment on, MPDES permits. ARM 17.30.1372. At the time of public notice, DEQ must issue a draft permit containing all information required to be in the MPDES permit. ARM 17.30.1370. DEQ must also provide, with the draft permit, a "fact sheet" containing a summary of the basis for permit conditions, including references to applicable statutory or regulatory provisions and "set forth the principal facts and the significant factual, legal, methodological and policy questions considered." ARM 17.30.1371.

28. Any decision by DEQ to issue a MPDES permit must be supported by a record providing a rational basis for the agency to find that the terms and conditions of the permit satisfy all legal requirements. *See* North Fork Pres. Ass'n v. Dept. of State Lands, 238 Mont. 451, 465, 778 P.2d 862 (1989); Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, (1983).

FACTUAL BACKGROUND

Stormwater Pollution in Montana

29. Urban runoff, or "stormwater," is created when precipitation from rain and snowmelt events flow over land or impervious surfaces and does not percolate into the ground. As stormwater flows over land or impervious surfaces (paved streets, parking lots, and building rooftops), it accumulates debris, chemicals, sediment or other pollutants that adversely affect water quality when it is discharged, untreated, into lakes, rivers, streams, and other waters. *See* U.S. EPA "Stormwater Program," available at https://www.epa.gov/npdes/npdes-stormwater-program.

30. Stormwater pollution is a substantial contributor to water quality impairments across the country. Nationally, urban runoff is responsible for more than 38,114 miles of impaired rivers and streams, 948,420 acres of impaired lakes, 2,742 square miles of impaired bays and estuaries, and 79,582 acres of impaired wetlands. Even though urban areas cover just 3 percent of the land mass of the United States, the influence of discharges from their impervious areas plays a disproportionately large role in undermining water quality. National Research Council, Urban Stormwater Management in the United States, National Academies Press, Washington, DC, 2009, at 21.

31. In Montana, DEQ consistently identifies stormwater as a leading cause of impairment in rivers, streams, and riparian areas that have experienced, or are being, developed.

32. Pursuant to its obligations under the CWA, DEQ publishes a 303(d) List of waters that fail to comply with state water quality standards because of excessive levels of pollution. *See* 33 U.S.C. § 1313(d). DEQ has identified over a dozen water bodies near large Montana cities where a violation of water quality standards is due, in part or in whole, to excess pollutants associated with municipal stormwater discharges. *See* DEQ, 2010, 2012, 2014, 2016 Integrated Reports, available online at http://deq.mt.gov/Water/WQPB/cwaic/reports.

33. Some of DEQ's TMDLs, such as those for Bozeman Creek and Mandeville Creek in Gallatin County, include Waste Load Allocations specifying a maximum amount of pollution that can be discharged from MS4s, consistent with achievement of water quality standards. General Permit at Appendix A.

The 2016 MPDES General Permit for MS4 Stormwater Discharges

34. DEQ classifies all MS4s in Montana as "small MS4s." DEQ has issued several iterations of MS4 General Permits, and most recently a General Permit in 2015.

35. Waterkeeper submitted extensive technical comments on the draft 2015 General Permit, suggesting numerous legal, technical, and policy improvements to address aspects of that General Permit which failed to satisfy applicable legal requirements. (See Exhibit 1, attached hereto).

36. Recognizing the need to substantively update its General Permit, DEQ issued the most recent permit effective January 1, 2015, with an expiration date of December 31, 2016. The abbreviated 2-year term was the result of discussions between DEQ, EPA,

the regulated community (county & municipal permittees), and stakeholders like Waterkeeper. DEQ entered into a Memorandum of Understanding on October 24, 2014, with existing MS4s to "cooperatively discuss and document common Montana-specific issues with implementation of the MS4 program." DEQ, MS4 General Permit Fact Sheet, 'Permit Status.' DEQ worked with the regulated community to hold, over the 2-year timeframe, a series of monthly meeting with interested parties, leading up to the issuance of a new draft permit for public comment and, ultimately, another final permit by the time the 2015 permit was set to expire on December 31, 2016. Waterkeeper participated substantively in nearly all of these monthly meetings, including providing both the regulated community and DEQ with legal, technical and policy improvements that would both ensure a final General Permit's legality and provide clarity in terms of Department and permittee duties towards protecting and improving urban waterway health.

37. Following over a year of meetings on specified issues with interested parties, especially representatives of the regulated community and stakeholders like Waterkeeper among others, DEQ issued for public comment a revised draft MS4 General Permit and supporting materials on September 16, 2016 (Draft 2017 General Permit).

38. Waterkeeper submitted detailed comments on the Draft 2017 General Permit, which repeated many of the concerns outlined in its 2015 draft permit comment letter. (See Exhibit 2, attached hereto). On November 30, 2016 DEQ issued the Final 2017 General Permit, along with a Response to Comments presenting DEQ's responses to

public comments submitted on the draft permit. Broadly, the new 2017 General Permit follows the pattern established by the 2015 version of the permit.

39. The General Permit requires each MS4 to develop and implement a Storm Water Management Plan (SWMP) and establishes six "minimum control measures," including controls on pollution discharges from construction and post-construction stormwater runoff, which all small MS4s in the state, regardless of location, must include in their SWMPs. General Permit at Parts II, V, IV.

40. The specific portions of the General Permit that address construction site stormwater runoff refer to "minimum standards," *i.e.*, stormwater control requirements, described in the Non-Numeric Technology-Based Effluent Limits of the most current version of the Montana General Permit for Storm Water Discharges Associated with Construction Activity. General Permit at Part II.A.4.a-c. The Construction Storm Water General Permit's effluent limitations, rather than the General Permit, identifies quantitative pollution control standards applicable to stormwater construction projects.

41. DEQ did not issue a revised General Permit for Storm Water Discharges Associated with Construction Activity when it issued the MS4 General Permit, and still has not done so.

42. Conversely, the specific portions of the General Permit that address post-construction stormwater runoff incorporate an explicit, numeric technology-based effluent limitation expressed in terms of a quantifiable level of stormwater retention. *E.g.*, controls must be designed to infiltrate, evapotranspire, and/or capture for reuse the post-construction runoff generated from the first .5 inches of rainfall from a 24-hour

storm preceded by 48 hours of no measurable precipitation. General Permit at Part II.A.5.b.iii. This retention-based standard is the same standard applied in the 2015 General Permit. Fact Sheet at Part X, "SWMP: Post-construction stormwater management in new development and redevelopment," pp.16.

43. DEQ rejected a request by Waterkeeper that the General Permit, instead of requiring token Best Management Practices that minimize pollution discharges, require compliance with a 'restoration' standard and/or a manual specifying Environmental Site Design practices (which are proven to restore hydrology or recreate equivalency thereof), and require a 100% retention performance standard because it has been shown practicable in other similar jurisdictions. (See Exhibit 2, attached hereto). None of these elements are required under the 2017 General Permit.

44. The General Permit's numeric, retention-based performance standard for post-construction stormwater control is, based on Part II.A.5.b's language and discussion in the Fact Sheet (Id., Fact Sheet at Part X, pp.16), the only substantive quantitative effluent limit for post-construction runoff control.

45. For MS4s with discharges that DEQ has previously determined cause or contribute to violations of water quality standards, and for which DEQ has already established TMDLs with applicable Waste Load Allocations (found in Appendix A of the General Permit), the General Permit states that "the permittee's SWMP must identify all outfalls that discharge to impaired waterbodies with an approved MS4 WLA, the impaired waterbodies, and the associated pollutant(s) of impairment." General Permit at Part III.B. Further, each "permittee must include in its SWMP a section identifying the measures and BMPs it plans to implement, describing the MS4's impairment

priorities and long term strategy, and outlining interim milestones (i.e., a completion schedule for action items) for controlling the discharge of the pollutants of concern and making progress towards meeting the TMDL." Id.

46. However, neither Appendix A (containing applicable TMDL Waste Load Allocations), other language of the General Permit, nor corollary TMDL summaries or discussion in the Fact Sheet (Fact Sheet at pp.20), establish effluent limitations or require MS4s to incorporate effluent limitations consistent with requirements of Waste Load Allocations.

47. MS4s subject to TMDLs are required under the General Permit to modify their SWMPs, by a specified date, to incorporate "measures and BMPs it plans to implement, describing the MS4's impairment priorities and long term strategy, and outlining interim milestones (i.e., a completion schedule for action items) for controlling the discharge of the pollutants of concern and making progress towards meeting [applicable] TMDL[s]." General Permit at Part III.B. After submission, "the [TMDL section of the SWMP] must be annually evaluated based on monitoring results, revised as needed, and resubmitted with Annual Reports beginning with the 5th year Annual Report." Id. DEQ rejected requests by Waterkeeper to include detailed assessment or planning criteria, the use of compliance schedules, and to ensure opportunities for public participation for these TMDL/impaired water improvement strategies. (See Exhibit 2, attached hereto). The General Permit does not include detailed assessment or planning criteria, compliance schedules, or ensure opportunities for public participation before DEQ concerning the adequacy of any improvement strategies.

48. The General Permit requires two distinct types of water quality monitoring: one specific to characterizing applicable MS4's discharges to impaired waterways, the other specific to determining compliance with permit requirements. General Permit at Part III.B, Part IV. Under each monitoring requirement, an MS4 would not be required to take any more than a maximum of eight (8x) samples annually.

49. DEQ rejected requests by Waterkeeper to modify and increase monitoring requirements to ensure that monitoring is representative of discharges from MS4s, and to ensure sufficient data exists by which to determine compliance with permit requirements. (See Exhibit 2, attached hereto).

CAUSES OF ACTION

First Cause of Action: DEQ Unlawfully Issued the General Permit Despite the Permit's Failure to Require MS4s to Reduce their Discharges of Pollutants to the Maximum Extent Practicable.

50. Plaintiff repeats and re-alleges the allegations contained in paragraphs 1-49.

51. Defendant DEQ cannot lawfully issue a permit for discharges from a small MS4 unless the permit includes, among other things, controls that reduce pollution in stormwater discharges to the "maximum extent practicable."

52. In two respects, language in the 2017 General Permit, which refers to requirements in the separate General Permit for Storm Water Discharges Associated with Construction Activity and a sole retention-based performance standard to control construction and post-construction stormwater pollution discharges, respectively, fails to require the control of such discharges to the maximum extent practicable.

53. First, because DEQ has not yet issued a new or revised version of the General Permit for Storm Water Discharges Associated with Construction Activity, the General

Permit, as issued, refers to the technical standards in an outdated version of said permit. This outdated version specifies stormwater control standards and practices that have been "on the books" for several permit terms, have not been meaningfully updated since inception, and have zero evidence in the record supporting a determination that they will reduce pollution discharges to the maximum extent practicable.

54. Second, the General Permit requires, as its primary mechanism for reducing post-construction stormwater discharges to the 'maximum extent practicable,' a numeric retention-based performance standard. DEQ's decision to impose a 0.5" retention standard ignored evidence in the record showing jurisdictions with similar climates, water resources, and populations, have implemented far more stringent performance standards (such as 100% retention) to address post-construction stormwater pollution. In fact, DEQ did not undertake any analysis to demonstrate that the .5" retention standard constitutes pollution controls the maximum extent practicable.

55. Defendant DEQ's issuance of the General Permit was arbitrary, capricious, and contrary to law because, in the ways described above, the General Permit fails to require controls that reduce the discharge of pollutants to the maximum extent practicable.

Second Cause of Action: DEQ Unlawfully Issued the General Permit Despite the Permit's Failure to Ensure Compliance with Water Quality Standards and with TMDL Waste Load Allocations.

56. Plaintiff repeats and re-alleges the allegations contained in paragraphs 1-49.

57. Defendant DEQ cannot lawfully issue a MPDES permit that fails to include limitations necessary to meet water quality standards or that fails to implement

pollution reductions consistent with a TMDL Waste Load Allocation. In several respects the General Permit violates these requirements.

58. First, the General Permit fails to incorporate applicable Waste Load Allocations. Instead, the General Permit references dicta in applicable TMDLs that attempt to exempt MS4 permits from including effluent limits consistent with TMDL requirements, *e.g.*, requirements such as a Waste Load Allocation explicitly showing a lbs/year reduction is needed of a pollutant for a certain waterway. DEQ cannot rely on unlawful language in an applicable TMDL and not incorporate effluent limitations that address Waste Load Allocations where developed. Exempting an MS4 permittee from the requirement to actually reduce pollutant discharges consistent with a Waste Load Allocation affirmatively allows applicable MS4s, which are already discharging pollutants at levels that violate water quality standards, to continue doing so indefinitely in violation of the CWA. By authorizing continuing pollutant discharges at current levels, rather than ensuring MS4 permits incorporate applicable Waste Load Allocations, the General Permit fails to include limitations necessary to meet water quality standards.

59. Put another way, because the requirements for controlling discharges of sediment under the existing stormwater regime resulted in impairment, continuing that practice of allowing development, yet not requiring actual reductions of sediment discharges, will not ensure compliance with water quality standards. As but one example, the General Permit fails to ensure that MS4 discharges to Bozeman Creek will reduce sediment loads from present levels, consistent with DEQ's Waste Load Allocation for sediment discharges to Bozeman Creek. In the Bozeman Creek TMDL, DEQ

determined that, to achieve water quality standards for sediment in that waterway, the MS4 needed to reduce discharges by 137 tons of sediment per year (which is a 37% reduction from estimated existing load). Despite this requirement, the 2017 General Permit would exempt applicable MS4s from in fact reducing the discharge of sediment.

60. Second, the General Permit does not include any interim benchmarks, milestones, or progress tracking for MS4s discharging stormwater to impaired waterways with TMDLs. Rather, the General Permit specifically delegates this responsibility to the permittee and, in any case, lacks any enforceable benchmarks to assess progress under Part III.B. Only by including deadlines based on pollutant load reductions can DEQ "ensure" compliance with water quality standards in impaired waterways with TMDLs, as required by the CWA. These dates and deadlines, however, are not discretionary nor capable of delegation to the permittee; it is DEQ's duty to place necessary terms in the General Permit that *ensure* compliance with water quality standards.

61. Third, the General Permit contains a specific provision that directs MS4s to create a "to be determined" strategy for addressing pollution contributions to local waterway impairment by the 5th permit year, *see* General Permit at Part III.B. This provision is essentially an empty vessel that fails to ensure the General Permit contains effluent limitations consistent with applicable WLAs and that those required effluent limitations will be met "as expeditiously as practicable," (*see* 33 U.S.C. § 1342(p)(4)(B)), if at all.

62. Specifically, as discussed *supra* at ¶ 46, the General Permit does not include pollution discharge reductions consistent with TMDL Waste Load Allocations. Rather, Part III.B exempts MS4s from developing and/or implementing requirements consistent with applicable Waste Load Allocations. These provisions do not meet the DEQ's obligation to ensure that each MS4 will comply with any applicable TMDL Waste Load Allocation because they do not provide substantive metrics by which each MS4's compliance can be determined. Indeed, the General Permit's Special Conditions section does not comply with the law in that it represents a circular argument, where many Waste Load Allocations are provided, but compliance therewith specifically excused, yet then later relied upon to provide assurances that the General Permit will ensure compliance with water quality standards.

63. Fourth, upon information and belief, Defendant DEQ's record related to the development and issuance of the General Permit fails to contain a finding, or evidence to support a finding, that the measures it requires of MS4s to reduce or control their stormwater discharges will be sufficient to ensure compliance with water quality standards. For example, the General Permit only requires MS4s to establish "policies," "procedures," and "schedules" for selecting and implementing stormwater controls, without specifying such things as the level of pollution control necessary or the total land area that must be subject to pollution reduction measures. Therefore, there is no rational basis on which DEQ, at the time it issued the General Permit, could have determined that the General Permit's requirements, which delegate authority to permittees to develop and implement pollution control related waterway

improvement strategies with little means of assessing progress, would ensure compliance with TMDL waste load allocations.

64. Defendant DEQ's issuance of the General Permit was arbitrary, capricious, and contrary to law because, in the ways described above, the General Permit fails to ensure compliance with water quality standards or with reductions in pollution discharges that are required pursuant to TMDL Waste Load Allocations.

Third Cause of Action: DEQ Unlawfully Issued the General Permit Despite the Permit's Failure to Require MS4s to Conduct Monitoring Representative of their Stormwater Discharges.

65. Plaintiff repeats and re-alleges the allegations contained in paragraphs 1-49.

66. MPDES permits must require permittees to monitor the permitted discharges, to assure that permittees are complying with the terms of their permit, state law, and federal law. The permit must include requirements to take samples and measurements representative of the quantity and character of the monitored discharge.

67. The General Permit contains two distinct monitoring requirements: TMDL-related and compliance-related monitoring. For TMDL-related monitoring, the General Permit provides two options. Option One consists of four sampling locations discharging to impaired waterways, to be monitored semi-annually (twice per year). Option Two is a blank-check to the permittee: the permittee is given carte blanche to create a monitoring plan subject, later, to DEQ approval. Similarly, Compliance-related monitoring provides two options. Option One requires semi-annual sampling within the MS4 jurisdiction during a storm event at 2 discharge points representative of commercial and/or industrial landscapes, and 2 discharge points which represent

runoff from a residential landscape. Option Two requires semi-annual monitoring, at 4 locations during storm events: one location to represent commercial and/or industrial runoff; one location to represent residential runoff; one to represent upstream ambient conditions, presumably outside the MS4 boundary; and the fourth location at the discretion of the permittee.

68. Put simply, at most the General Permit requires eight (8x) TMDL-related samples annually to assess permittee progress towards compliance with water quality standards, including TMDL obligations. Likewise, the General Permit at most requires eight (8x) compliance-related samples annually to assess MS4 pollution discharges, four (4x) to assess commercial and/or industrial related pollution, and four (4x) to assess residential related pollution.

69. There is no rational basis on which DEQ, at the time it issued the General Permit, could have determined that the General Permit's monitoring requirements are capable of providing (a) representative data, or (b) capable of determining compliance with permit requirements, such as substantive requirements of an MS4's SWMP or the requirement that discharges not cause or contribute to a violation of water quality standards.

70. For example, the City of Bozeman (including its long-time co-permittee the Montana State University) contains approximately 19 square miles of land. Four (4x) impaired waters run through this developed landscape:

- Bozeman Creek: 4.9 impaired miles, sediment, nutrient, e.coli impaired, from the confluence with Limestone Creek to its mouth at the East Gallatin River. At least 40% of watershed considered residential in nature;
- East Gallatin River: upper segment 7 miles, lower segment 13.5 miles, nutrient impaired;

- Bridger Creek: 21.5 miles from headwaters to confluence with E. Gallatin River, nutrient impaired; and
- Mandeville Creek: 5.6 miles impaired, nutrient impaired, largely channelized and underground.

See DEQ, Lower Gallatin TMDL. Similarly, the 2010 MS4 Permit issued to co-permittees the City of Bozeman, Montana State University, and the Montana Dept. of Transportation allowed the discharge of stormwater to the following surface waters, generally:

- Spring Creek (city)
- Bozeman Creek (city & MDT)
- Bridger Creek (city)
- E Gallatin River (city & MDT)
- Farmers Canal (city & MSU)
- Bear Creek (city)
- Baxter Creek (city & MDT)
- Maynard Border Ditch (city & MDT)
- Mandeville Creek (city & MSU)
- Middle Creek Ditch (city & MSU)
- West Gallatin Canal (MSU)
- Unnamed Ditch – West End MSU (MSU)

71. Furthermore, the greater City of Bozeman metropolitan area is developing – and in fact growing – at a rapid rate, the corollary being that each additional citizen carries with them the likelihood of increased land use development and/or pollutant loading. The City of Bozeman in fact increased in population from 27,509 citizens in 2000 to 37,280 in 2010, a 26% increase.

72. In light of the many stream miles receiving MS4 discharges in the Bozeman area, these waters' disparate locations, the differing and evolving land use types, and the several distinct pollutants of concern and/or impairments at issue, it stretches the imagination to believe that eight (8x) TMDL monitoring samples and eight (8x) compliance monitoring samples will be sufficient to provide data representative of

MS4 discharges, let alone assure compliance with water quality standards including, specifically, that such monitoring cannot be sufficient to determine compliance with the General Permit's prohibition against discharges that cause or contribute to violations of water quality standards. General Permit at Part I, "Effluent Limitations," pp.8. Neither the General Permit or Fact Sheet provide data or analysis supporting a finding that such monitoring will in fact be representative, or that such monitoring will be sufficient to determine compliance.

73. Defendant DEQ's issuance of the General Permit was arbitrary, capricious, and contrary to law because the General Permit fails to require that MS4s conduct monitoring sufficiently representative of their stormwater discharges or sufficient to determine compliance under the General Permit.

Fourth Cause of Action: DEQ Unlawfully Issued the General Permit Despite the Fact it Creates a Self-Regulatory Scheme Prohibited by the Clean Water Act. (33 U.S.C. § 1251(e), 33 U.S.C. § 1342(a)(1) & (j)

74. Plaintiff repeats and re-alleges the allegations contained in paragraphs 1-49.

75. MPDES permits must include all "effluent limits" necessary to comply with the requirements of the CWA and state WQA and their implementing regulations, including, for MS4 permits, effluent limitations that reduce the discharge of pollutants to the maximum extent practicable and ensure compliance with water quality standards and TMDL Waste Load Allocations. DEQ is responsible for ensuring that all effluent limitations pursuant to the General Permit comply with these requirements. Under the CWA and state law, the public has a right to meaningfully participate in the agency's review of any proposed effluent limitations, including the

right to submit comments to DEQ and an opportunity for a public hearing before DEQ on the adequacy of such effluent limits.

76. SWMPs, which define specific pollution control requirements that MS4s must implement under the terms of its General Permit, are a form of effluent limitation. The "TBD" impaired waterway improvement strategies that Part III.B of the General Permit requires, and which the General Permit describes as part of the SWMP, are a form of effluent limitation.

77. Monitoring requirements under the General Permit also constitute effluent limitations.

78. The General Permit does not provide an opportunity for the public to submit comments to DEQ, nor an opportunity for a public hearing before DEQ, on the adequacy of the "TBD" impaired waterway improvement strategies allowed pursuant to Part III.B.

79. Similarly, the same section of the General Permit fails to provide the public an opportunity to submit comments to DEQ, or an opportunity for a public hearing before DEQ, on the adequacy of TMDL-related sampling plans. In fact, the General Permit only provides that "[a]fter the Sampling Plan is approved by the Department, the Permittee must provide a mechanism for public review." Finally, with respect to compliance-related monitoring, there is simply no provision for public review.

80. Defendant DEQ's issuance of the General Permit was arbitrary, capricious, and contrary to law because, in the ways described above, the General Permit establishes an impermissible self-regulatory scheme, whereby MS4s develop for themselves critical effluent limitations that are not subject to public comment and/or the opportunity for a hearing on the adequacy thereof before DEQ.

REQUEST FOR RELIEF

WHEREFORE, Waterkeeper prays for relief against Defendant DEQ as follows:

A. For an order declaring void *ab initio* DEQ's issuance of the 2017 General Permit for Municipal Separate Storm Sewer Systems, and remanding the permit to DEQ for reconsideration in light of its lawful mandates.

B. For a determination and declaration that issuance of the 2017 General Permit is illegal and violates the CWA and MWQA for its failure to require MS4s to reduce their discharges of pollutants to the maximum extent practicable.

C. For a determination and declaration that issuance of the 2017 General Permit is illegal and violates the CWA and MWQA for its failure to ensure compliance with water quality standards and with TMDL waste load allocations.

D. For a determination and declaration that issuance of the 2017 General Permit is illegal and violates the CWA and MWQA for its failure to require monitoring representative of MS4 stormwater discharges.

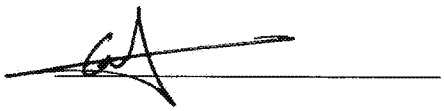
E. For a determination and declaration that issuance of the 2017 General Permit is illegal and violates the CWA by sanctioning the creation of an impermissible self-regulatory scheme, and that directs DEQ to ensure the public is afforded opportunities to participate in the setting of effluent limitations under the General Permit.

F. For reasonable attorneys' fees and expenses as damages under the Private Attorney General Theory and as otherwise provided by law.

G. For costs of suit.

H. For such further relief as this Court deems equitable and just.

Dated this 30th day of DECEMBER 2016.



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